United Nations A/HRC/30/NGO/125

General Assembly

Distr.: General
8 September 2015

English only

**Human Rights Council**
**Thirtieth session**
Agenda item 2
**Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General**

# Written statement* submitted by the Pasumai Thaayagam Foundation, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[31 August 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.15-15227(E)

Please recycle

# Political change cannot be a substitute for justice and accountability, international accountability process is a must for accountability and reconciliation in Sri Lanka*

United Nations Human Rights Council passed a resolution on the 26 March 2014, calling for setting up an international investigation mechanism[1] in Sri Lanka via the OHCHR. Even though the Investigation started in June 2014 the publication of the report was delayed. This was due to the political changes in Sri Lanka and the opportunity to strengthen the report, but the fact remains that the OISL team did not get access to do an in-country investigation despite of the political change. The delayed report will be published in September 2015 followed-up by discussions in the council.

Pasumai Thaayagam Foundation would like to thank the member States for passing three consecutive resolutions in promoting reconciliation and accountability in Sri Lanka. This has pushed the Sri Lankan state in a direction to address democratic deficits of Sri Lanka. Pasumai Thaayagam Foundation would like to re-iterate its position on the international mechanism[2] to address accountability issues to achieve a sustainable lasting peace in the Island of Sri Lanka.

Pasumai Thaayagam Foundation would like to state that neither a domestic mechanism nor a hybrid mechanism would be able to deliver justice to the victims in Sri Lanka. Justice can only be meted out by referring Sri Lanka to the International Criminal Court or by setting-up a dedicated ad-hoc international tribunal.

In the Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka[3] (March 31, 2011) it is stated inter alia: "Accountability also requires official acknowledgement by the State of its role and responsibility in violating the rights of its citizens when that has occurred." When the State itself is implicated in international crimes, it cannot play any role in the administering of justice pertaining to those crimes. As the accepted legal principle holds, nemo judex in sua causa– an accused cannot be judged in one's own case.

The underlying nature of the conflict in Sri Lanka is a conflict between two nations, namely Sinhala Nation and Tamil Nation. Given that, for a State to play a role in its resolution, it must be neutral. However, as demonstrated by Sri Lanka's history since "independence", the Sri Lankan State, including the judiciary, overwhelmingly dominated by the Sinhala Nation, has failed to uphold even the appearance of neutrality. The judiciary has always been subservient to the political leadership when it comes to abuses against Tamils, and that is evidenced by all of the past Commissions of Inquiry.

The mandate of the OISL is not limited to war crimes but also includes international crimes, which is further defined in Article V of the Rome Statute of the International Criminal Court as consisting of the crime of genocide; crimes against humanity; war crimes; and the crime of aggression. Article II of the 1948 Genocide Convention defines genocide to mean "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such." By this very definition of genocide, the Sri Lankan State, controlled almost exclusively by the Sinhala ethnic group, will not be able to adjudicate any charge of genocide by the Sri Lankan State against the Tamils, whether as part of a hybrid mechanism or a domestic mechanism. Therefore, an outside, independent international mechanism is essential for a fair adjudication of the crimes which fall within the purview of the mandate.

---

[1] Resolution by UN HRC 25/... Promoting reconciliation, accountability and human rights in Sri Lanka http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/25/L.1/Rev.1

[2] Written statement* submitted by PasumaiThaayagam Foundation, to the 25th session of the HRC session. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/114/66/PDF/G1411466.pdf?OpenElement

[3] Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf

It has been the belief in some quarters that the changing of the guard would result in change in institutionalized impunity in Sri Lanka. The Tamils have seen numerous government changes since Sri Lanka becoming an independent State in 1948, and none of the governments made any sincere effort to address Tamil grievances.

None of Sri Lanka's domestic mechanisms, including the one that had the International Independent Group of Eminent Persons, has been successful. Accountability and justice are processes that must be credible in the view of the victims, ensuring the free participation of the victims, and complying with international norms and standards. Further, given that the exclusively Sinhalese Sri Lankan military apparatus is still intact, and given the intense militarization of the North East where the Tamil victims live, the Tamils will continue to be fearful to participate in any in-country process.

Given the history and politics of Sri Lanka, a domestic or hybrid mechanism will not meet these standards and thus the only fair option is an international process led by the United Nations.

A hybrid tribunal can be useful, where a state has the will, but lacks the capacity to deliver justice. This is not the case in Sri Lanka, because there is no political will to prosecute members of the Sinhala Nation or to deliver justice to the Tamils.

Pasumai Thaayagam Foundation believes that the present government lacks the stability and capacity to uphold a prolonged trial of war crimes, crimes against humanity, and genocide. Such a trial, if held by Sri Lankan state, will only intensify anti-Tamil sentiments and may result in anti-Tamil pogroms. The result will be diametrically opposed to what the accountability process hopes to achieve, namely non-recurrence, deterrence, healing and peace. The Secretary General's internal report on the failures in Sri Lanka (the Petrie Report) gave birth to the Rights Upfront initiative, drawing lessons from Sri Lanka. The UN should not fail the Tamil victims yet again by instituting any mechanism dependent on the Sri Lankan State.

The Sri Lanka's constitution has no provisions to investigate War Crimes, Crimes against Humanity, Genocide or mass atrocities. The constitution does not allow retrospective legislation to be passed either[4]. Therefore, it is technically impossible to investigate the allegations of war crimes, crimes against humanity and crime of Genocide under the same international norms within the domestic process.

The Tamil people in the island of Sri Lanka have lost faith in the domestic institutions. The ongoing structural genocide has been a result of complex political and economic policies of the Sri Lankan state. On 10 February 2015 the Northern Provincial Council (NPC) unanimously passed a resolution stating what happened to the Tamils in Sri Lanka is Genocide[5]. This was the lived experience of the Tamils in the island of Sri Lanka and elsewhere

The following extract from the Northern Provincial Council resolution sums up the need for an international tribunal in the island of Sri Lanka:

> "The obligation to prevent and punish genocide under the Genocide Convention is not a matter of political choice or calculation, but one of binding customary international law. This Council urges OISL to comprehensively investigate and report on the charge of genocide in its submission to the UN Human Rights Council in March 2015. The UN Security Council should refer the situation in Sri Lanka to the International Criminal Court for prosecutions based on war crimes, crimes against humanity, and genocide."[6]

Pasumai Thaayagam Foundation would like to highlight the member States of the plight and sufferings of the victims, who have been waiting for a long a time for justice and accountability. Any sort of domestic or hybrid mechanism will de-rail the genuine accountability process. Only an international tribunal to investigate crimes under international law that includes war crimes, crimes against humanity and the crime of genocide in the Island of Sri Lanka can deliver sustainable peace, address impunity and non-recurrence of the crime in the future.

---

[4] http://www.priu.gov.lk/Cons/1978Constitution/CONTENTS.html

[5] Northern Provincial Council Resolution: Sri Lanka's Genocide Against Tamils http://www.jdslanka.org/images/documents/npc_resolution_on_tamil_genocide.pdf

[6] http://www.jdslanka.org/images/documents/npc_resolution_on_tamil_genocide.pdf

**We call upon the member states to pass a follow-up resolution in regards to Sri Lanka in September to:**

Refer the case of Sri Lanka to the International Criminal Court or an international accountability process via setting up an ad-hoc international tribunal.

Sri Lanka should be called to sign the Rome Statute of the International Criminal Court and Sign the Declaration of Commitment to End Sexual Violence in Conflict with immediate effect.

---

*British Tamils Forum (BTF), UK NGO without consultative status, also shares the views expressed in this statement.